

**NO. PD-748-17**

**IN THE COURT OF CRIMINAL APPEALS OF TEXAS**  
FILED  
COURT OF CRIMINAL APPEALS  
12/4/2017  
DEANA WILLIAMSON, CLERK

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**KELSEY JO LACKEY**

**v.**

**THE STATE OF TEXAS**

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On Discretionary Review From the  
Waco Court of Appeals  
Cause No. 10-17-00016-CR

**BRIEF FOR APPELLANT**

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**ORAL ARGUMENT REQUESTED**

## **Identity of Judge, Parties and Counsel**

Appellant, pursuant to Rule of Appellate Procedure 68.4(a), provides the following list of the trial court judge, all parties to the trial court's judgment, and the names and addresses of all trial and appellate counsel.

### **THE TRIAL COURT:**

Travis Bryan, III 272nd District Court, Brazos County 300 East 26th Street, Suite 204 Bryan, Texas 77803	Trial Court Judge
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### **THE DEFENSE:**

Kelsey Jo Lackey	Appellant
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Craig A. Greening Greening Law, PC 409 East 26th Street Bryan, Texas 77803	Trial Counsel
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**THE STATE:**

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## Statement of the Case

The trial court denied Appellant's two motions to quash the indictment. (CR13, 14) Thereafter, Appellant pleaded guilty to 2 counts of felony theft. (CR219-26), (1RR7)<sup>1</sup> The trial court sentenced Appellant to 3 years' imprisonment on one count and 10 years' community supervision on the other count. (2RR5), (CR267-68, 303-04) Appellant sought to appeal the adverse rulings on the motions to quash. (CR213-14)

The Waco Court of Appeals dismissed Appellant's appeal in an opinion authored by Justice Scoggins. Chief Justice Gray dissented. Appellant timely filed a motion for rehearing. After requesting a response and receiving same, the Waco Court denied Appellant's motion for rehearing with Chief Justice Gray dissenting.

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<sup>1</sup> Because the court of appeals summarily dismissed this appeal, no reporter's record was filed. Appellant has included in the appendix certified copies of 3 volumes of the reporter's record consisting of the plea hearing, the sentencing hearing, and a post-trial hearing on the State's Motion to Deny Bond and Amend the Trial Court's Certification of the Defendant's Right of Appeal. Appellant refers to these volumes respectively as "1RR", "2RR", and "3RR". Appellant refers to the clerk's record as "CR". Transcriptions of these hearings were also attached as Exhibits 17, 18 and 19 to a mandamus petition filed with the court of appeals and with the trial court. (CR403-18, 451-63, 464-81)

## **Statement Regarding Oral Argument**

Oral argument will aid the decisional process. By granting oral argument, counsel may answer questions posed by the judges and explain in more detail why the factors touching on the validity of boilerplate waivers show that the waivers in this case should not be enforced. For these reasons and to address any other issues, Appellant respectfully requests the opportunity to appear and present oral argument.

## **Issue Presented**

1. Did Appellant voluntarily, knowingly and intelligently waive his right of appeal by signing boilerplate waivers?

## **Statement of Facts**

A Brazos County grand jury indicted Appellant Kelsey Jo Lackey for two counts of theft of property with an aggregate value of \$200,000 or more. Mr. Lackey filed two pretrial motions to quash the indictment. (CR32-40, 128-31) The trial court denied both. (CR13, 14)

Then, the parties negotiated a plea bargain whereby Mr. Lackey would plead guilty to the lesser-included offense of theft of property valued at \$100,000 or more but less than \$200,000 on Count One and theft of property valued at \$200,000 or more on Count Two. Under the agreement, the State would recommend a three-year sentence on the first count and a probated sentence for the second count. (CR217-18)

As part of that plea process, Mr. Lackey signed two 4-page documents entitled “Defendant’s Plea of Guilty, Waiver, Stipulation and Judicial Confession.” (CR219-26) The first section of each of these documents consists of Mr. Lackey’s voluntary statement that he understands the charges, his right to a jury trial, his right to remain silent, his right of confrontation. Mr. Lackey also acknowledged that admonitions that were set out below in the document “have been explained to me by the Judge and by my defense

attorney before entering an oral plea of guilty or nolo contendere.” (CR219, 223)

Next the plea documents acknowledged that Mr. Lackey was charged with first-degree felonies and the applicable punishment range. (CR219, 223)

The plea documents then provide an admonishment regarding the right of appeal.

I further understand that any recommendation of the prosecuting attorney as to punishment is not binding on the Judge, and that where there is a plea bargain agreement and the punishment assessed by the Judge does not exceed the agreed recommendation, I do not have the right to appeal without permission of the Judge except for those matters raised by written motions filed before trial.

(CR220, 224)

Next, the plea documents discuss deportation consequences for non-citizens. (CR220, 224)

After that, the plea documents contain a series of express waivers, including:

1. Reading of indictment;
2. Service of indictment 10 days before trial;
3. Arraignment;
4. Jury trial;
5. Right to remain silent;
6. Right of confrontation;
7. 10 days preparation after appointment of counsel; and



8. Presentence report.

(CR221, 225)

The plea documents next contain judicial confessions to the offenses charged and any lesser-included offenses. (CR221, 225)

Next, the plea documents affirm that the pleas are voluntary. (CR221, 225)

The plea documents then include boilerplate waiver language regarding the right to pursue a motion for new trial and to appeal.

I further understand that if I am convicted I have the right to pursue a motion for new trial and appeal to the appropriate Court of Appeals of Texas, and the right to be represented on appeal by an attorney of my choice or if I am too poor to pay for such attorney or the record on appeal, the Judge will, without expense to me, provide an attorney and a proper record for such motion for new trial and appeal. However, it is my desire to waive my right *to pursue a motion for new trial* and to appeal, and I hereby voluntarily, knowingly and intelligently waive those rights in the event that the Judge accepts the plea bargain agreement. I understand that if the Judge accepts the plea bargain agreement, I may appeal only with permission of the court.

(CR221, 225)

The plea documents conclude with the signatures of Mr. Lackey, the attorneys and the court. The court's certification, preceding its signature, provides, among other things, that it clearly appeared to the court "that the

defendant understands the consequences of *waiving his right to pursue a motion for new trial* and appeal and that he/she has voluntarily, knowingly and intelligently waived those rights in the event that the Court accepts the plea bargain agreement.” (CR222, 226)

The plea proceedings took place in August 2016. During the plea colloquy, the trial court first confirmed that Mr. Lackey’s name was spelled correctly. Then Mr. Lackey waived the right to have the indictment read. (1RR4) The court next reviewed the 2 plea documents: Exhibit 1 reflecting the plea bargain and Exhibit 2 being the above-described plea, stipulation, waiver and judicial confession. (1RR4-5) The court reviewed the applicable range of punishment. (1RR5)

The court then advised Mr. Lackey that the plea documents “also give you your rights in the criminal case.” (1RR5) The court specifically addressed the right to jury trial, the burden of proof, the right of confrontation, and the right to remain silent. (1RR5-6) Mr. Lackey answered affirmatively when the court asked him if by signing the documents he “indicate[d his] desire to waive [his] rights and plead guilty.” (1RR6) The court did not discuss the right of appeal.

The court confirmed the terms of the plea bargain and received Mr. Lackey's guilty pleas. (1RR6-7)

The parties asked the court to postpone sentencing while they negotiated the amount of restitution. (1RR7-8) The court found Mr. Lackey guilty and delayed sentencing. (1RR8-9)

The court signed the trial court certification of defendant's right of appeal for Count 2 on December 19, 2016 certifying that this is a plea-bargain case but Mr. Lackey had the right to appeal the court's rulings on a pretrial motion that was "not withdrawn or waived." (CR212) The court signed a similar certification for Count 1 on January 6, 2017. (CR211)

The parties had the sentencing hearing on January 6, 2017. The court sentenced Mr. Lackey in accordance with the plea bargain. (2RR5), (CR267-68, 303-04) Mr. Lackey's appellate counsel then advised the court of Mr. Lackey's intent to appeal the denial of the motions to quash. Counsel asked the court to approve an appeal bond for the prison case and allow Mr. Lackey to remain on his current bond for the probation case. (2RR7)

The prosecutor argued that Mr. Lackey waived appeal. Mr. Lackey's counsel replied that the certification indicated he could appeal, and the court coordinator confirmed that. (2RR7) Mr. Lackey's trial counsel added that

they had “crossed out the waivers” in the plea documents because they intended to appeal the denial of the motions to quash. (2RR7-8)

The prosecutor replied that he understood there would not be an appeal without the court’s permission. Mr. Lackey’s trial counsel responded that they only agreed to plead guilty so they could appeal because the State refused to allow Mr. Lackey to plead “no contest” and waive his right to appeal. The prosecutor insisted that they had only discussed the State’s refusal to allow a no-contest plea and never addressed the right of appeal. (2RR8-9)

After reviewing the plea documents, the court observed that Mr. Lackey’s trial counsel had not struck any waivers. (2RR10) Trial counsel asked for permission to appeal. The State confirmed that Mr. Lackey could appeal only with the court’s permission. The court denied the request. (2RR10-11)

Mr. Lackey filed a notice of appeal stating his intent to appeal the denial of his written pretrial motion. (CR213-14)

The parties appeared before the court again on January 30, 2017. The State asked the court to deny an appeal bond and amend the certifications. (CR244) The court advised that it had already prepared an amended

certification and asked defense counsel to review it. (3RR4) Counsel responded by explaining that Mr. Lackey and his attorneys went forward with the guilty pleas based on the attorneys' understanding that he could appeal the pretrial ruling. The attorneys specifically advised Mr. Lackey that he could appeal that decision. (3RR4-5) The court replied that he considers such an appeal waived unless it is brought to the court's attention at the time the plea is entered. (3RR5-6) The court conceded that he did not read the initial certifications before signing them. (3RR6)

After an additional exchange<sup>2</sup> between the court and defense counsel, the State asked the court to enter the proposed first amended certification that states Mr. Lackey waived his right of appeal. (3RR8-9) The court noted the refusal of the defense to sign the amended certification. The State reiterated its insistence that an appeal was never discussed during plea negotiations. The State also commented that the prosecutors do not usually see the certification before it is submitted to the court. (3RR9-10) The court

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<sup>2</sup> Among other things, the court advised that it believed defense counsel had "pulled a fast one on the Court." (3RR7)

replied, “It was slipped in.” Mr. Lackey’s trial counsel disputed that, but the court persisted in its opinion. (3RR10)

The court concluded by reciting the language included in the amended certification:

I, Judge of the Trial Court, certify this criminal case is a plea bargain case; and matters were raised by written motion, filed and ruled on before trial; but those matters were waived at the plea hearing; and permission to appeal, though not appropriate, was denied. See State's Exhibit Number 1.

(3RR11)

The Trial Court’s 1st Amended Certification of Defendant’s Right of Appeal was filed without the signatures of Mr. Lackey or his counsel. (CR239)

The Court of Appeals dismissed the appeal based on the amended certification with Chief Justice Gray dissenting. *Lackey v. State*, No. 10-17-00016-CR, 2017 WL 1148239, at \*1 (Tex. App.—Waco Mar. 20, 2017, pet. granted) (mem. op., not designated for publication).

## Summary of the Argument

The right to appeal does not depend on tracking through a trail of technicalities. Here, Mr. Lackey seeks to exercise his statutory right to appeal the trial court's denials of his motions to quash the indictment. The State and the trial court have tried to veto his right of appeal.

During the course of signing pages of documents for a plea-bargain proceeding, Mr. Lackey signed boilerplate waivers of appeal. Conversely, the trial court signed certifications of the right of appeal reflecting Mr. Lackey's right to appeal the adverse ruling on his pretrial motion.

At sentencing, Mr. Lackey notified the trial court of his intent to appeal. The State objected, and the trial court indicated that it would not permit the appeal. The trial court later amended the certifications to indicate that Mr. Lackey had waived appeal.

Mr. Lackey's boilerplate waivers should not be enforced because: (1) they were not bargained for; (2) the trial court did not orally admonish him at any time about waiving his right of appeal; (3) the documents on file are contradictory regarding any waiver; and (4) the court and the parties made no statements on the record before sentencing suggesting that Mr. Lackey

had waived his right of appeal. Accordingly, Mr. Lackey's boilerplate waivers were not made voluntarily, knowingly or intentionally.

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## **Argument**

### **1. Did Appellant voluntarily, knowingly and intelligently waive his right of appeal by signing boilerplate waivers?**

An appellate court will enforce a defendant's waiver of appeal if made voluntarily, knowingly and intelligently unless the trial court grants permission to appeal. A boilerplate waiver of appeal will not be enforced if the record contains other information indicating that the defendant did not intend to waive the right of appeal. Here, Mr. Lackey intended to pursue his statutory right to appeal the trial court's pretrial denials of his motions to quash. Because his boilerplate waivers were not bargained for and because the record contains contradictory information on this issue, the Court should hold that his boilerplate waivers were not voluntarily, knowingly and intelligently made and should not be enforced.

#### **A. A plea-bargaining defendant has the statutory right to appeal an adverse ruling on a pretrial motion.**

Article 44.02 of the Code of Criminal Procedure authorizes a plea-bargaining defendant to appeal, but "he must have permission of the trial court, except on those matters which have been raised by written motion filed prior to trial." TEX. CODE CRIM. PROC. art. 44.02. Stated differently, a plea-bargaining defendant has a statutory right to appeal the denial of a

written pretrial motion regardless of whether the trial court permits the appeal.

Rule of Appellate Procedure 25.2(a)(2) was drafted to effectuate this statutory right. The rule provides that a plea-bargaining defendant may appeal only:

- (A) those matters that were raised by a written motion filed and ruled on before trial, or
- (B) after getting the trial court's permission to appeal.

TEX. R. APP. P. 25.2(a)(2).

Rule 25.2(a) also requires a trial court to enter a certification of the defendant's right of appeal concurrently with entry of judgment. *Id.*

**B. The right of appeal does not rest on hypertechnical compliance.**

This Court has held on more than one occasion that the rules relating to the perfection of an appeal must not be construed in a manner that elevates form over substance.

A person's right to appeal a civil or criminal judgment should not depend upon tracking through a trail of technicalities. In former days, this Court was sometimes accused of elevating form over substance in demanding technical perfection in the notice of appeal.

*Few v. State*, 230 S.W.3d 184, 190 (Tex. Crim. App. 2007); *accord Gonzales v. State*, 421 S.W.3d 674, 675 (Tex. Crim. App. 2014).

**C. Any waiver of appeal must be made voluntarily, knowingly and intelligently.**

A defendant may waive many of his constitutional and statutory rights, including the right of appeal. *See* TEX. CODE CRIM. PROC. art. 1.14(a). A waiver of appeal is valid and enforceable if “made voluntarily, knowingly, and intelligently.” *Jones v. State*, 488 S.W.3d 801, 805 (Tex. Crim. App. 2016); *Ex parte Broadway*, 301 S.W.3d 694, 697 (Tex. Crim. App. 2009).

**D. A waiver of appeal that is regular on its face may not be enforced in some cases.**

This Court has recognized at least two situations where a written waiver of appeal that appears regular on its face may not be enforced. First, a trial court may grant permission to appeal notwithstanding an otherwise valid waiver. And second, a boilerplate waiver will not be enforced if the appellate court is confronted with a contradictory record that rebuts the validity of the waiver. The latter situation applies to Mr. Lackey’s waiver.

**1. A trial court may grant permission to appeal notwithstanding an otherwise valid waiver of appeal.**

This Court has held for decades that a valid<sup>3</sup> waiver of appeal will preclude a defendant from pursuing an appeal without the consent of the trial court. *E.g., Monreal v. State*, 99 S.W.3d 615, 622 (Tex. Crim. App. 2003); *Ex parte Tabor*, 565 S.W.2d 945, 946 (Tex. Crim. App. 1978); *Reed v. State*, 516 S.W.2d 680, 682 (Tex. Crim. App. 1974); *see* 43B GEORGE E. DIX. & JOHN M. SCHMOLESKY, TEXAS PRACTICE SERIES: CRIMINAL PRACTICE AND PROCEDURE § 56:8 (3d ed. 2011). Thus, a trial court may supersede an otherwise valid waiver of appeal by granting permission to appeal.

More recently, the Court has applied this principle to cases involving waivers of appeal included as boilerplate language in lengthy plea documents that waive a host of statutory and constitutional rights. *See Willis*

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<sup>3</sup> “A valid waiver of the right of appeal is one that was made voluntarily, knowingly, and intelligently.” *Jones v. State*, 488 S.W.3d 801, 805 (Tex. Crim. App. 2016). Thus, this Court has also historically recognized that, absent the permission of the trial court, a defendant who has signed a waiver of appeal may nevertheless contend on appeal that the waiver “was coerced or involuntary.” *Ex parte Tabor*, 565 S.W.2d 945, 946 (Tex. Crim. App. 1978); *accord Monreal v. State*, 99 S.W.3d 615, 624 (Tex. Crim. App. 2003) (Johnson, J., concurring). Here, Mr. Lackey contends that his boilerplate waiver of appeal was not made voluntarily, knowingly or intelligently.

*v. State*, 121 S.W.3d 400, 403 (Tex. Crim. App. 2003); *Alzarka v. State*, 90 S.W.3d 321, 322-24 (Tex. Crim. App. 2002).

But even though *Willis* and *Alzarka* referenced the boilerplate nature of the waivers at issue, the clear holding of *Reed* and its progeny is that a trial court may supersede **any** waiver of appeal—regardless of whether it was made voluntarily, intelligently and knowingly and regardless of whether it was found somewhere in the midst of the boilerplate language of a standard plea document.

The trial court in Mr. Lackey’s case denied his request for permission to appeal after the unwitting waiver was discovered. (2RR11)

**2. A boilerplate waiver will not be enforced if a contradictory appellate record rebuts the validity of the waiver.**

Since *Alzarka*, Texas appellate courts have declined to enforce boilerplate waivers of appeal on several occasions where the appellate record contained contradictory information rebutting the validity of the waiver—more specifically, rebutting the defendant’s seemingly voluntary, intelligent and knowing waiver of appeal.

The reasons boilerplate waivers of appeal are eyed with some suspicion are well documented. Most courts use lengthy plea documents

filled with boilerplate language when receiving a guilty plea. The apparent purpose of these legalese-filled documents is to address as many conceivable legal grounds for challenging a conviction as possible to forestall a subsequent attack by a plea-bargaining defendant. Because these documents usually include even the kitchen sink as well as an extra stopper, courts will not enforce boilerplate waivers of appeal if the record contains other information suggesting that the defendant did not voluntarily, intelligently and knowingly waive his right of appeal.

Boilerplate plea documents typically include: a judicial confession; the admonishments required by article 26.13;<sup>4</sup> waivers of various constitutional rights such as the right to jury trial and the right of confrontation; waivers of various statutory rights afforded by the Code of Criminal Procedure

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<sup>4</sup> Article 26.13 prescribes 6 admonishments a trial court must give to a defendant who pleads guilty or nolo contendere: (1) the range of punishment; (2) that the State's recommendation is not binding but the defendant may withdraw his plea if it is not followed; (3) that the defendant cannot appeal without the court's permission, except as to matters raised by pretrial motions, if the court follows the agreement; (4) the potential immigration consequences; (5) that the defendant may be required to register as a sex offender if applicable; and (6) that the court may release the defendant from the penalties and disabilities of the conviction if he successfully completes his community supervision. See TEX. CODE CRIM. PROC. art. 26.13(a). The statute requires only "substantial compliance." *Id.* art. 26.13(c).

(whether applicable to the specific case or not);<sup>5</sup> and verbiage designed to ensure that the defendant is competent to plead guilty. The possibilities for inclusion vary by jurisdiction but are extensive.

Because a waiver of appeal must have been made voluntarily, knowingly, and intelligently to be enforceable, appellate courts are wary of enforcing a waiver buried in boilerplate language if the record contains other information suggesting that the defendant did not intend to waive appeal.

An appellate court should consider the totality of the record in determining whether a boilerplate waiver of appeal is enforceable. *See Ex parte De Leon*, 400 S.W.3d 83, 87 (Tex. Crim. App. 2013). While a boilerplate waiver raises a presumption of waiver, the boilerplate waiver will not be enforced if the totality of the record “rebut[s] any presumption raised by the terms of the boiler-plate form.” *Id.* at 90 (quoting *Alzarka*, 90 S.W.3d at 324); *see ones*, 488 S.W.3d at 808.

Texas appellate courts consider several factors in evaluating the validity of a boilerplate waiver, including: (1) whether the waiver was a

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<sup>5</sup> The plea documents here purport to waive or acknowledge at least 8 separate statutory rights or requirements.

bargained-for condition of the plea agreement; (2) the extent to which the trial court admonished the defendant regarding his right of appeal; (3) statements made on the record reflecting an intent to appeal; (4) other documents on file relevant to the defendant's right of appeal.<sup>6</sup>

**a. bargained-for waivers**

A waiver will usually be enforced if the record shows that the waiver of appeal itself was bargained for.

The Court applies general contract-law principles to determine the contents of a plea agreement. *Jones*, 488 S.W.3d at 805; *De Leon*, 400 S.W.3d at 89 (citing *Ex parte Moussazadeh*, 64 S.W.3d 404, 411-12 (Tex. Crim. App. 2001)). “Appellate courts look to the written agreement, as well as the formal record, to determine the terms of the plea agreement, and we will imply a term only when necessary to effectuate the intention of the parties.” *Id.*

The Court found the waiver in *Jones* to be bargained for. The record demonstrated that the defendant had agreed to waive his right to jury trial

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<sup>6</sup> The courts have also considered whether the trial court granted permission to appeal. *E.g.*, *Willis v. State*, 121 S.W.3d 400, 403 (Tex. Crim. App. 2003); *Alzarka v. State*, 90 S.W.3d 321, 324 (Tex. Crim. App. 2002). Yet the trial court's permission obviates the need to consider anything else when determining whether a defendant who signed a waiver of appeal has the right to appeal. *See Monreal*, 99 S.W.3d at 622; *see also Willis*, 121 S.W.3d at 403; *Alzarka*, 90 S.W.3d at 324.



and his right of appeal in exchange for the State's abandonment of an enhancement allegation. *See Jones*, 488 S.W.3d at 807-08. And other documents on file supported the Court's determination that the waiver was valid. *Id.*

The written plea agreement in *Marsh* expressly waived the defendant's right to appeal "in exchange for the prosecutor's recommendation." *Marsh v. State*, 444 S.W.3d 654, 656 (Tex. Crim. App. 2014). The Court found this to be "a clear waiver of appeal," particularly where the defendant stated on the record that he understood he was waiving his right of appeal. *Id.* at 660.

The Court recognized in *Thomas* that boilerplate waiver was not bargained for because the defendant pleaded guilty to charge without a plea agreement and gained nothing from her plea. *See Thomas v. State*, 408 S.W.3d 877, 887 (Tex. Crim. App. 2013). The trial court's admonishments only confirmed that the defendant had not waived her right of appeal. *Id.*

The Court considered the terms of the plea agreement in *De Leon*. The Court began with the boilerplate waiver language and noted that it was contradictory—one paragraph stated that the defendant must have the trial court's permission to appeal but the very next one stated that the defendant was waiving his right to appeal. *De Leon*, 400 S.W.3d at 89. Later, the Court

considered the terms of the plea agreement as stated in the written judgment, and the stated terms were silent about the right to appeal. *Id.* at 90. After considering the terms of the plea agreement as well as other aspects of the record discussed below, the Court declined to enforce the boilerplate waiver. *Id.*

In *Corral*, the Court found that a boilerplate waiver was not bargained for just because it appeared in the plea documents. *See Corral v. State*, No. PD-1601-07, 2008 WL 2514780, at \*1 (Tex. Crim. App. June 25, 2008) (not designated for publication). The trial court's admonishment and the trial court's certification of the right of appeal confirmed that the boilerplate waiver should not be enforced. *Id.*

In *Iles*, the defendant signed 4 separate documents that contained waivers of appeal in 2 different cases heard together. In each case, he signed a general waiver of constitutional rights, stipulation of evidence, and judicial confession. The other document he signed in each case was a 2-page set of written admonishments followed by a list of 8 representations he made to the court including an express waiver of appeal if the court accepted the plea agreement. *Iles v. State*, 127 S.W.3d 347, 348-49 (Tex. App.—Houston [1st Dist.] 2004, no pet.). The First Court chose to enforce these waivers even

though (1) the defendant filed a notice of appeal stating his intent to appeal the pretrial denial of suppression motions (2) the trial court appointed appellate counsel and ordered preparation of the appellate record at no cost to the appellant; and (3) the court entered written findings of fact and conclusions of law regarding the voluntariness of his statement to the police — one of the things challenged in his suppression motions. *Id.* at 349.

**b. trial court admonishments**

Trial court admonishments about the right of appeal generally impact the analysis in one of two ways. First, the trial court may wholly fail to orally admonish the defendant about the right of appeal which tends to undercut the validity of a boilerplate waiver. And second, the trial court may orally affirm the defendant's right of appeal which tends to negate the validity of a boilerplate waiver.

In *Marsh*, the trial court asked the defendant during the plea hearing if he understood he was waiving his right of appeal, and he said he did. The trial court asked him at the sentencing hearing if he had signed the certification<sup>7</sup> reflecting a waiver of appeal, and he said he had. *See Marsh*, 444

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<sup>7</sup> Henceforth, Mr. Lackey refers to the trial court certification of the defendant's right of appeal as the "certification."

S.W.3d at 656. The Court concluded that these acknowledgments supported his “clear” bargained-for waiver. *Id.* at 660.

In *De Leon*, the trial court admonished the defendant that he could not appeal unless he was granted permission. *See De Leon*, 400 S.W.3d at 89-90. But this was not sufficient to make the boilerplate waiver enforceable after considering other aspects of the record—particularly, that the waiver was not bargained for. *Id.* at 90.

The trial court in *Thomas* failed to admonish the defendant about any waiver of appeal during the plea colloquy and affirmatively advised her at the conclusion of the sentencing phase that she would be allowed to appeal. *See Thomas*, 408 S.W.3d at 887. In the absence of a bargained-for waiver, the Court relied on this to decline to enforce a boilerplate waiver. *Id.*

The trial court in *Corral* specifically admonished the defendant that he could appeal pretrial rulings. *See Corral*, 2008 WL 2414780, at \*1.

The trial court in *Grice* likewise wholly failed to admonish the defendant about a waiver of the right of appeal. *Grice v. State*, 162 S.W.3d 641, 643 (Tex. App.—Houston [14th Dist.] 2005, pet. ref’d). When the Fourteenth Court considered this along with statements made on the record

and other documents in the record, the court declined to enforce the boilerplate waiver. *Id.* at 645.

In *Alzarka*, the trial court wholly failed to admonish the defendant about any waiver of the right of appeal. Instead, the court acknowledged that the defendant had the right to appeal an adverse ruling on a suppression motion and expressly granted permission to appeal. *See Alzarka*, 90 S.W.3d at 323.

**c. other statements made on the record**

Aside from trial court admonishments, appellate courts also consider other statements made on the record during the trial proceedings.

The Court observed in *De Leon* that neither the trial court nor the parties discussed any waiver of appeal when the terms of the plea agreement were stated on the record. This added further weight to other information in the record that led the Court to conclude the boilerplate waiver should not be enforced because it was not bargained for. *See De Leon*, 400 S.W.3d at 90.

In *Grice*, defense counsel stated on the record that they intended to appeal a suppression ruling, and the trial court orally affirmed this and stated that he had “noted that on the appeals” (apparently referring to the

certification). *See Grice*, 162 S.W.3d at 643. This was central to the Fourteenth Court's decision not to enforce the boilerplate waiver. *Id.* at 645.

The First Court upheld the waivers in *Iles* where the parties did not discuss an appeal during the suppression hearing and the defendant waived the making of a reporter's record during the plea hearing so there were no statements on the record indicating an intent to appeal. *See Iles*, 127 S.W.3d at 349.

The trial court in *Garcia* asked defense counsel if the defendant wanted to appeal his suppression ruling. Counsel stated that was his intent, and the State consented on the record. *Garcia v. State*, 95 S.W.3d 522, 523 (Tex. App. — Houston [1st Dist.] 2002, no pet.). Garcia then pleaded “no contest” and received community supervision under a plea bargain. The trial court announced the amount of the appeal bond at the conclusion of the hearing. *Id.* at 523-24. The First Court relied on the statements made on the record as well as entries on the docket sheet to conclude that a boilerplate waiver should not be enforced. *Id.* at 524-25.

Both parties and the trial court in *Alzarka* expressly discussed and affirmed the defendant's intent to appeal the suppression ruling, and the

trial court orally granted him permission to do so. *See Alzarka*, 90 S.W.3d at 323.

**d. other documents in the record**

In addition to these other matters, appellate courts look to documents in the record other than the boilerplate waiver.

This Court found further support for enforcing the bargained-for waiver in *Jones* from the certification that indicated a waiver of appeal. *See Jones*, 488 S.W.3d at 807.

The Court in *De Leon* considered (1) the terms of the plea agreement (“In Detail”) as stated in the judgment and (2) the certification. *See De Leon*, 400 S.W.3d at 90. The former indicated that the waiver was not bargained for while the latter (though not signed by the trial court) indicated that the defendant had no right of appeal. Notwithstanding the language of the certification, the Court concluded that the boilerplate waiver should not be enforced because it was not bargained for. *Id.*

The Corpus Christi Court in *Hubert* considered only the documents in the record when it decided not to enforce a boilerplate waiver. *See Hubert v. State*, 286 S.W.3d 484, 488 (Tex. App.—Corpus Christi 2009), *rev’d on other grounds*, 312 S.W.3d 554 (Tex. Crim. App. 2010). There, the parties added a

handwritten notation in the plea agreement that the agreement waived all pretrial motions “except those matters ruled [on] by the Court.” Further, the certification reflected a right to appeal rulings on pretrial motions. *Id.*

The Corpus Court relied on *Hubert* one year later to again reject a boilerplate waiver. In *Park*, the court looked at 3 contradictory documents: (1) a plea agreement in which the defendant waived any filed pretrial motions but did not waive the right to appeal adverse rulings on pretrial motions; (2) a statement of admonishments in which the defendant acknowledged that he could not appeal without the court’s permission except on pretrial motions ruled on by the court; and (3) the certification reflecting the right to appeal an adverse ruling on a pretrial motion. *See Park v. State*, No. 13-08-00543-CR, 2010 WL 1115678, at \*2 (Tex. App.—Corpus Christi Mar. 25, 2010, no pet.) (mem. op., not designated for publication).

The certification in *Corral* stated that the defendant had the right to appeal an adverse pretrial ruling. *See Corral*, 2008 WL 2514780, at \*1.

The documents on file in *Grice* were contradictory. They included: (1) a boilerplate waiver of appeal, (2) a notation on the judgment that appeal had been waived, and (3) a certification reflecting a right to appeal. *See Grice*, 162 S.W.3d at 643. In the face of this contradictory record, the Fourteenth



Court found the statements made on the record and the certification most persuasive in declining to enforce the waiver. *Id.* at 645.

In *Willis*, the trial court's permission to appeal superseded the written waiver. *See Willis*, 121 S.W.3d at 403. Yet the Court also considered other documents on file—specifically, an agreed setting form signed by the court and the parties that contained a handwritten notation to “check atty on appeal of MSEH” which the Court construed to refer to the suppression motion that was the subject of the appeal. *Id.* at 401.

The docket sheet in *Garcia* included notations that the court had granted permission to appeal and set an appeal bond. The First Court relied on these notations as well as the discussion on the record of the defendant's intent to appeal the suppression ruling to conclude that a boilerplate waiver should not be enforced. *Garcia*, 95 S.W.3d at 524-25.

**E. Appellant's boilerplate waivers should not be enforced.**

After applying the factors discussed above, the Court should conclude from the totality of the record that Mr. Lackey did not waive his right to appeal the trial court's denials of his motions to quash.

**1. The waivers were not bargained for.**

The record contains nothing indicating that the waivers were bargained for. Rather, they were buried in boilerplate language. (CR219-26)

The parties signed specific plea agreements as separate documents that set out the following details of the agreements for each count:

- 1) the State agreed to allow Mr. Lackey to plead guilty to the lesser-included offense of theft of property valued at \$100,000 or more but less than \$200,000 for Count One;
- 2) the parties agreed to a 3-year sentence for Count One and a probated sentence for Count Two;
- 3) Mr. Lackey agreed to pay all court costs for both counts; and
- 4) the parties agreed to 6 specific conditions of community supervision.

(CR217-18)

The only term of the plea agreement recited in the judgment for Count One is a 3-year sentence. (CR267-68)

The terms of the plea agreement recited in the judgment for Count Two were more extensive:

TEN (10) YEARS TDCJ PROBATED TEN (10) YEARS, 150 HOURS CSR, NO CONTACT WITH ROWE BANSCH OR ANY OTHER EMPLOYEE OF NDC SOLUTIONS, RESTITUTION \$350,000 (WITH \$50,000 PAID AT SENTENCING), FORFEIT

ANY SEIZED PROPERTY TO NDE SOLUTIONS OR ITS  
RIGHTFUL OWNER

(CR303)

The specific written recitations of the terms of the plea agreement do not include a waiver of appeal. *Cf. Marsh*, 444 S.W.3d at 656.

As in *De Leon*, neither the trial court nor either party referred to a waiver of appeal when the terms of the plea agreement were discussed on the record. (1RR6-7) *See De Leon*, 400 S.W.3d at 90.

And the terms of the plea agreement as stated in the judgments do not refer to any waiver of appeal. *Cf. id.*

Accordingly, the record does not support a finding that Mr. Lackey's boilerplate waivers of appeal were bargained for.

**2. The trial court failed to admonish Mr. Lackey about any waiver of appeal.**

The trial court wholly failed to orally admonish Mr. Lackey regarding any waiver of his right to appeal during the plea hearing. (1RR5-6) *Cf.*

Again at sentencing, the trial court wholly failed to address the issue of appellate rights. (2RR4-5) The subject did not arise until after the court had sentenced Mr. Lackey and counsel then advised of his intent to appeal. (2RR7) *Cf. Marsh*, 444 S.W.3d at 656.

**3. The statements on the record do not reflect waivers.**

The other relevant statements on the record do not support a finding of waiver. As in *De Leon*, neither the court nor the parties discussed any waiver of appeal during the initial plea hearing. *See De Leon*, 400 S.W.3d at 90.

Rather, the statements reflect the State's post-sentencing assertion that Mr. Lackey had waived his right of appeal, Mr. Lackey's claims to the contrary, and the trial court's denial of permission to appeal. (2RR7-11) These statements were essentially repeated at the subsequent hearing where the court signed the amended certification. (3RR4-11)

**4. The other documents are contradictory at best.**

And finally, the other documents on file are collectively contradictory. *See Hubert*, 286 S.W.3d at 488. The trial court signed a certification as to Count Two before sentencing that stated Mr. Lackey had the right to appeal adverse pretrial rulings. (CR212) *Cf. Corral*, 2008 WL 2514780, at \*1; *Park*, 2010 WL 1115678, at \*2; *Hubert*, 286 S.W.3d at 488; *Grice*, 262 S.W.3d at 643. The trial court signed a certification as to Count One on the day of sentencing – the same day the dispute first arose about whether Mr. Lackey had waived appeal – again confirming Mr. Lackey's right to appeal. (CR211)

*Id.* But 24 days' later, the trial court signed an amended certification (at the State's request and following a contentious hearing) in which the court certified that Mr. Lackey had waived appeal. (CR239) *Cf. De Leon*, 400 S.W.3d at 90 (contradictory documents); *Park*, 2010 WL 1115678, at \*2 (same); *Grice*, 262 S.W.3d at 643 (same).

Although the trial court asserted that he had not read the original certifications before signing them (3RR6), the fact remains that the trial court signed one of them on the same date that the parties first argued about whether Mr. Lackey had waived appeal. The trial court's purported failure to read what he signed is no excuse—particularly where the parties are debating the right of appeal in open court before him.

The documents on file are at best contradictory regarding a waiver of appeal and do not suffice to conclude Mr. Lackey voluntarily, knowingly and intelligently waived his right to appeal.

To deny Mr. Lackey his statutory right of appeal under the circumstances would be to return to the Court's former practice of elevating form over substance. *Cf. Gonzales*, 421 S.W.3d at 675; *Few*, 230 S.W.3d at 190.

Mr. Lackey's intent has clearly been to appeal the denial of his motions to quash from the beginning. The trial court's initial certifications confirm

Mr. Lackey's intent – regardless of whether the prosecutor or the trial court read them when Mr. Lackey's counsel submitted them (or when the trial court signed them).

This Court must not allow the State and the trial court to veto Mr. Lackey's statutory right of appeal where his trial counsel inadvertently failed to strike the boilerplate language waiving the right to appeal. The trial court's refusal to permit this appeal and the State's refusal to agree to it do not mean that Mr. Lackey voluntarily, knowingly and intelligently waived his right of appeal.

**F. A few modifications to the procedures for appeal waivers could obviate most of the issues at play in these cases.**

This Court does not make law by judicial fiat. *See Garcia v. State*, 829 S.W.2d 796, 800 (Tex. Crim. App. 1992) (plurality op.) (declining to read inevitable discovery exception into article 38.23). But the Court can declare preferences and recognize that certain practices and procedures will best accomplish desired outcomes for predictability and consistency in this area. With this understanding, Mr. Lackey offers three suggestions.

First, requiring or encouraging a separate waiver of appeal obviates the boilerplate issue. And this makes sense because a waiver of appeal is

different from most other waivers made during plea proceedings. For example, the waiver of jury and waiver of confrontation are self-evident in the proceedings. The defendant appears before the court without a jury and without witnesses and enters his plea. Conversely, the waiver of appeal operates prospectively to waive potential errors that may not have occurred yet or that the defendant is unaware of at the time of the waiver.

Second, the parties should be required or encouraged to sign a specific document that recites the entirety of the plea agreement – including whether a waiver of appeal is a bargained-for part of the agreement. And when the trial court inquires as to the terms of the agreement, this document will accurately reflect those terms (and the court or the prosecutor can state those terms on the record).

Third, the trial court should specifically admonish the defendant **when receiving the defendant's plea**: (1) about the statutory right to appeal adverse rulings on pretrial motions; (2) that the court can grant permission to appeal; and (3) if a waiver of appeal has been signed, that the defendant

has waived his right to appeal.<sup>8</sup> If there is any question about whether the waiver was voluntarily, knowingly and intentionally made, it can be resolved at that juncture.

## **G. Conclusion**

For each of the reasons stated, this Court should conclude that Mr. Lackey's boilerplate waivers of appeal are not valid or enforceable because he did not make them voluntarily, intelligently or knowingly. The majority of the Waco Court erred by concluding otherwise.

The Court should reverse and remand this appeal with instructions to the lower court to: (1) direct the filing of the reporter's record; (2) the parties to file briefs on the merits with regard to the trial court's denial of Mr. Lackey's motions to quash; and (3) adjudicate the merits of the appeal.

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<sup>8</sup> And if sentencing is conducted at a later date (perhaps after a presentence investigation), then it would be advisable to discuss the waiver of appeal again at sentencing and confirm that the defendant intended to waive appeal.



## Prayer

WHEREFORE, PREMISES CONSIDERED, Appellant Kelsey Jo Lackey asks the Court to: (1) reverse the judgment of the court below; and (2) grant such other and further relief to which he may show himself justly entitled.

Respectfully submitted,

/s/ Alan Bennett  
E. Alan Bennett  
SBOT #02140700  
Counsel for Appellant

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## **Certificate of Compliance**

The undersigned hereby certifies, pursuant to Rule of Appellate Procedure 9.4(i)(3), that this computer-generated document contains 8,074 words.

/s/ Alan Bennett  
E. Alan Bennett

## **Certificate of Service**

The undersigned hereby certifies that a true and correct copy of this corrected petition was served electronically on December 4, 2017 to: (1) counsel for the State, Douglas Howell, III, dhowell@brazoscountytexas.gov; and (2) the State Prosecuting Attorney, information@SPA.texas.gov.

/s/ Alan Bennett  
E. Alan Bennett

## **Appendix**

1. Reporter's record of August 22, 2016 plea hearing
2. Reporter's record of January 6, 2017 sentencing hearing
3. Reporter's record of January 30, 2017 hearing on State's motion to amend certifications

## **APPENDIX – TAB 1**

REPORTER'S RECORD  
VOLUME 4 OF 8 VOLUMES

TRIAL COURT CAUSE NO. 13-04695-CRF-272

APPELLATE COURT CASE NO. 10-17-00016-CR

THE STATE OF TEXAS

v.

KELSEY JO LACKEY

§ IN THE DISTRICT COURT OF

§

§

§

§

§

§

§

§

BRAZOS COUNTY, TEXAS

272ND JUDICIAL DISTRICT

-----  
PLEA HEARING  
-----

On the 22nd day of August 2016, the following proceedings came to be heard in the above-entitled and -numbered cause before the Honorable Travis B. Bryan, III, Judge presiding, held in Bryan, Brazos County, Texas:

Proceedings reported by computerized stenotype shorthand.

Kaetheryne B. Kyriell, CSR  
Official Court Reporter

272nd District Court, Brazos County, Texas

 **Certified  
Transcript**

A P P E A R A N C E S

Mr. John L. Brick  
Brazos County District Attorney's Office  
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ATTORNEY FOR THE STATE OF TEXAS

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ATTORNEY FOR THE DEFENDANT

CHRONOLOGICAL INDEX  
VOLUME 4  
(PLEA HEARING)

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VOLUME 4  
(PLEA HEARING)

(No witnesses offered.)

EXHIBIT INDEX  
VOLUME 4  
(PLEA HEARING)

(No exhibits offered.)

1                    P R O C E E D I N G S

2                    (Open court, defendant present, no jury,  
3                    12:37 PM.)

4                    THE COURT: Kelsey Lackey.

5                    We ready?

6                    MR. BRICK: Yes.

7                    THE COURT: Raise your right hand.

8                    (The defendant was duly sworn.)

9                    THE COURT: Take a look at this indictment  
10                  and tell me if your name is spelled correctly.

11                  THE DEFENDANT: Yes, sir.

12                  THE COURT: They got you charged with theft  
13                  of property more than 200,000 in value, two counts. You  
14                  understand what you're charged with?

15                  THE DEFENDANT: Yes, sir.

16                  THE COURT: The law requires I read this  
17                  whole indictment to you word for word, if you want me  
18                  to; or you can waive, that means give up, your right to  
19                  have it all read word for word. Would you like to waive  
20                  it?

21                  THE DEFENDANT: Yes, please.

22                  THE COURT: Showing you now State's Exhibit  
23                  No. 1 in Count 1, State's Exhibit 1 in Count 2. Did you  
24                  go over all these with your lawyer, these two?

25                  THE DEFENDANT: Yes, sir.



1 THE COURT: Did you sign both of them on  
2 the back?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Count 1 is a second-degree  
5 felony which carries a range of punishment of anywhere 2  
6 up to 20 years in the penitentiary and a fine of up to  
7 \$10,000. Count 2 is a first-degree felony carrying a  
8 range of anywhere from 5 up to 99 years or life in the  
9 penitentiary and a fine up to \$10,000. You understand  
10 the range of punishment on both of these?

11 THE DEFENDANT: Yes, sir.

12 MR. BRICK: Judge, just to be clear for the  
13 record, we are proceeding on Count 1 as lesser included  
14 of second degree. So they're indicted as a first, but  
15 we have agreed to do it as a second degree to get down  
16 to that two-year range.

17 THE COURT: So you'll be pleading to lesser  
18 included of second degree, and I went over with you the  
19 correct range of punishment for a second degree.

20 These forms also give you your rights in  
21 the criminal case. You have a right to fight either one  
22 or both these counts. The State would have to prove  
23 beyond a reasonable doubt each element of the charge.  
24 If they fail to do that to any one juror, you could  
25 be -- you could not be convicted of the charge. You

1 understand that?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: You have a right to have your  
4 lawyer cross-examine the witnesses against you. He  
5 could call witnesses, subpoena witnesses to testify on  
6 your behalf, and also put you object the stand, let you  
7 tell your side of it. If you choose to remain silent  
8 and not take the stand, no one could hold your silence  
9 against you.

10 Those are some of the rights you have in  
11 both these cases. -Do you understand those rights?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: When you signed the back of  
14 both these State's 1, did you indicate your desire to  
15 waive your rights and plead guilty?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Showing you now State's Exhibit  
18 No. 2 on Count 1. Is that your plea bargain agreement?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Showing you now -- where is  
21 Count 2?

22 THE COORDINATOR: That piece of paper. It  
23 looks a little different.

24 MR. BRICK: It's just a single sheet of  
25 paper.

1 THE COURT: Plea agreement. It's  
2 typewritten. Showing you now State's Exhibit No. 2, a  
3 plea agreement. Is that your plea bargain in Count 2?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: How do you wish to plead in  
6 Count 1, theft 100,000 to 200,000, lesser included  
7 offense second-degree felony?

8 THE DEFENDANT: Guilty.

9 THE COURT: How do you wish to plead to  
10 Count 2?

11 THE DEFENDANT: Guilty as well.

12 THE COURT: All right. Are you pleading to  
13 both these counts because you are, in fact, guilty of  
14 both these counts and not for any other reason?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Offer by the State.

17 MR. BRICK: I would offer Exhibits 1 and 2  
18 for purposes of this hearing. I don't have three yet.  
19 What we're asking is to reset for actual sentencing so  
20 they can get three organized because there's a million  
21 pages of documents that try and document that's been  
22 turned over.

23 But also the parties are trying to come to  
24 that agreement. You see the restitution spot there is  
25 still blank. We're going to try to come to an agreement



1 on that between now and the sentencing date.

2 THE COURT: Whatever that agreement is, if  
3 he doesn't like it, I'm not letting him withdraw his  
4 plea. This is final today.

5 MR. BRICK: Otherwise it would be a  
6 restitution hearing only.

7 MR. GREENING: The agreement of the parties  
8 is if we can't decide that issue, then you'll decide it.

9 THE COURT: In other words, Mr. Lackey, you  
10 understand this is a point of no return here as far as  
11 your guilty plea is concerned?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: You can't come back in later  
14 and say, "Well, Judge, I don't like that. I want to  
15 withdraw the restitution."

16 THE DEFENDANT: Yes, sir.

17 THE COURT: So I go ahead find you guilty  
18 in the lesser included Count 1. Based on the evidence  
19 and your plea, I find you guilty of the second-degree  
20 felony. And I will recess -- I do go ahead and assess  
21 your punishment at two years in the Institutional  
22 Division Texas Department of Criminal Justice. I'll  
23 postpone sentencing, however, until a later date. And  
24 also to determine restitution as part of that.

25 And in Count 2 you have agreed to a

1     probated sentence. Is this deferred or not deferred?

2                     MR. BRICK: This is not deferred. Just ten  
3     years probated for ten years.

4                     THE COURT: In Count 2 I find you guilty of  
5     Count 2 and assess your punishment at ten years in  
6     prison. I'll suspend the imposition of that and place  
7     you on probation for a period of ten years with the  
8     conditions of probation as listed in the plea bargain  
9     agreement.

10                    Now, so we're going to come back on a later  
11     date for -- I have already sentenced him. I guess I  
12     need to withdraw that.

13                    MR. BRICK: Yeah, with all the sentencing,  
14     I think you can announce what the plea agreement is.

15                    THE COURT: That will be the assessment of  
16     punishment. You will not be sentenced until a later  
17     date.

18                    How's that?

19                    MR. BRICK: That's fine.

20                    THE COORDINATOR: Judge, can we talk about  
21     that reset date on that sentencing?

22                    THE COURT: Sure.

23                    THE COORDINATOR: They have not given me a  
24     date yet.

25                    THE COURT: When we going to do that?

1 MR. GREENING: Well, Judge, I looked at my  
2 calendar in September, October. Just completely full  
3 right now.

4 THE COURT: You got three lawyers working  
5 on the case. Right?

6 MR. GREENING: Well, now it's me.

7 THE COURT: The other two abandon you?

8 MR. GREENING: Well, they were -- one was  
9 an appellate lawyer, and one was assisting me.

10 THE COURT: When do you want to do this?

11 MR. GREENING: I was hoping for November  
12 but --

13 MR. BRICK: I would like it --

14 THE COURT: What do you say to that?

15 MR. BRICK: Well, I think November is  
16 pretty far out. We talked about sometime in late  
17 October. I would like it within 30 days, but I know  
18 he's busy in October.

19 THE COURT: You willing to agree to late  
20 October?

21 MR. BRICK: I think he looked at the 19th.

22 MR. GREENING: Yes, I'm available that  
23 date.

24 THE COURT: October 19th?

25 MR. GREENING: I don't know if Lisa has

1 that available.

2 THE COORDINATOR: Eight-thirty?

3 THE COURT: Eight-thirty, October 19th.

4 That's what it will be.

5 Anything else today?

6 MR. GREENING: No, your Honor.

7 THE COURT: The State?

8 MR. BRICK: No, your Honor.

9 THE COORDINATOR: Get Mr. Lackey's  
10 fingerprint, and I have a setting notice.

11 (Proceedings adjourned at 12:44 PM.)

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## 1 REPORTER'S CERTIFICATE

2 THE STATE OF TEXAS

3 COUNTY OF BRAZOS

4 I, Kaetheryne B. Kyriell, Official Court Reporter  
5 in and for the 272nd District Court of Brazos County,  
6 State of Texas, do hereby certify that the above and  
7 foregoing contains a true and correct transcription of  
8 all portions of evidence and other proceedings requested  
9 in writing by counsel for the parties to be included in  
10 this volume of the Reporter's Record, in the  
11 above-styled and -numbered cause, all of which occurred  
12 in open court or in chambers and were reported by me.

13 I further certify that this Reporter's Record of  
14 the proceedings truly and correctly reflects the  
15 exhibits, if any, admitted by the respective parties.

16 WITNESS MY OFFICIAL HAND this the 8th day of March  
17 2017.

18  
19  
20 

21  
22 /s/ Kaetheryne B. Kyriell

23 Kaetheryne B. Kyriell, Texas CSR 6083  
24 Expiration Date: 12/31/2017  
25 Official Court Reporter  
272nd District Court  
Brazos County, Texas  
Bryan, Texas 77803

 Certified  
Transcript



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Trial Court Cause No. 13-04695-CRF-272

Court of Appeals No. 10-17-00016-CR

THE STATE OF TEXAS                   :     IN THE DISTRICT COURT OF  
  :  
VS.                                     :  
  :  
KELSEY JO LACKEY                    :     272nd JUDICIAL DISTRICT

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SENTENCING HEARING

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On the 6th day of January, 2017, the following  
proceedings came on to be held in the above-titled and  
numbered cause before the Honorable Travis B. Bryan, III,  
Judge Presiding, held in Bryan, Brazos County, Texas.

Proceedings reported by computerized stenotype  
machine.

Denise Phillips, Texas CSR #6482  
Official Court Reporter - 272nd District Court  
300 East 26th Street, Suite 204  
Bryan, Texas 77803  
979-361-4221

**CERTIFIED  
TRANSCRIPT**

DENISE C. PHILLIPS, CSR  
OFFICIAL COURT REPORTER  
272ND DISTRICT COURT



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DENISE C. PHILLIPS, CSR  
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272ND DISTRICT COURT

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OFFICIAL COURT REPORTER  
272ND DISTRICT COURT

## P R O C E E D I N G S

THE COURT: All right. Kelsey Lackey?

Anything else prior to sentencing?

MR. BRICK: Not from the State, Your Honor.

Although, the only other thing I guess is there was -- we were going to have a State's 3, Exhibit 3, listing all the documents.

THE COURT: Okay.

MR. BRICK: And there's bankers boxes of documents. I don't have that here, but Craig and I have talked about what we're going to do. We're probably just going to print out everything that we uploaded to Secure Share. I'm sure he has more than I do anyway, but -- and put a coversheet showing State's 3 that we'll agree to, and we'll submit that to the Court.

MR. GREENING: I'll sign off on that, Judge. We don't have any --

THE COURT: You're okay with that procedure?

MR. GREENING: Yes, I am.

THE COURT: All right.

MR. GREENING: And then the only thing in addition is we did satisfy the conditions of the plea bargain agreement by tendering a check of \$50,000 from my trust account to NDE Solutions.

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272ND DISTRICT COURT



1 THE COURT: All right.

2 MR. BRICK: And I'm aware that they have  
3 received that.

4 SENTENCE OF THE COURT

5 THE COURT: On Count 1, if I haven't  
6 already, I find you guilty of the lessor-included offense  
7 of theft 100,000 to \$200,000 and assess your punishment at  
8 three years in the Institutional Division of the Texas  
9 Department of Criminal Justice. You're hereby sentenced,  
10 Mr. Lackey, to three years in the penitentiary.

11 On Count 2, if I haven't already, I find  
12 you guilty as charged of the offense of theft of property  
13 more than \$200,000 and assess your punishment at ten years  
14 in the Institutional Division of the Texas Department of  
15 Criminal Justice. That will be suspended and probated for  
16 a period of ten years. Is there anything -- 150 hours of  
17 community service; have no contact with Rowe Bansch or any  
18 other employee of NDE Solutions, LLC; forfeit any seized  
19 property to NDE Solutions, LLC or its rightful owners.  
20 You've already made the -- you need -- you're ordered to  
21 pay \$350,000 in restitution.

22 He's already paid 50 you said?

23 MR. BRICK: That's correct.

24 THE COURT: Okay. So 300 more.

25 Anything else?

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1 MR. BRICK: Just as to the property, we do  
2 have a motion that they've filed today I think to return  
3 property, and I know it's part of the civil plea  
4 agreement. The civil case settled.

5 There was an agreement of what property to  
6 return? And we're fine with that except that there was  
7 one computer that we have to check on that's different  
8 than the civil agreement, that last one? What was that?  
9 We've got to check on that.

10 MR. GREENING: The Samsung Galaxy. That  
11 was from the conspiracy case.

12 MR. BRICK: Oh, okay.

13 MR. GREENING: And it was just taken to  
14 download the --

15 MR. BRICK: Okay. Got you. It's just a  
16 phone.

17 MR. GREENING: It's just a phone.

18 THE COURT: Anything else?

19 MR. GREENING: No, Your Honor.

20 COURT COORDINATOR: Here's the order that  
21 they just referred to on that Motion to Release Property.

22 THE COURT: Okay. I'm signing the order.  
23 The 6th day of January.

24 Anything else?

25 MR. BRICK: Not that I'm aware of.

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272ND DISTRICT COURT

1 THE COURT: Good luck to you, sir.

2 MR. VAN BRUNT: Your Honor, on the -- now,  
3 that he's been sentenced, we're filing -- his  
4 certification says that he's got a right to appeal. So  
5 we're filing the Notice of Appeal.

6 THE COURT: All right.

7 MR. VAN BRUNT: And I've got a motion for a  
8 stay of the holding -- remaining him at large in his  
9 current bond pending appeal. The community supervision  
10 case case law says that's pretty much how it goes; but as  
11 for the prison case, we'd ask that you hold the same  
12 thing. Otherwise, just set a reasonable bond. We've got  
13 a motion here I'm filing right now on that, Your Honor.

14 MR. BRICK: And Judge, my understanding was  
15 he has waived the right to appeal for the certification.

16 THE COURT: That's part of the plea  
17 bargain?

18 MR. VAN BRUNT: The certification is -- is  
19 that -- it's a pretrial motion.

20 COURT COORDINATOR: They checked the other  
21 one that he has the right to appeal.

22 MR. VAN BRUNT: And I believe there was no  
23 waiver in the --

24 MR. GREENING: Yeah, we crossed out the  
25 waivers. We had pretrial motions that were ruled upon and

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1 denied about a year and a half ago that -- giving the  
2 right to appeal.

3 MR. BRICK: Well, this is all news to me  
4 then because I thought that this was all based on a plea  
5 agreement where there's not going to be an appeal without  
6 the Court's permission.

7 MR. GREENING: Well, no, we approached  
8 y'all with -- with a no contest plea; and you said -- and  
9 you would waive the right to appeal. We ended up having  
10 to enter a plea of guilty to have the right to appeal.

11 MR. BRICK: That wasn't our agreement.

12 THE COURT: Where is the warning form on  
13 this Count 1?

14 COURT COORDINATOR: It's in here, Judge.  
15 Let me have all of that right there.

16 Here's the one on Count 1 that you just  
17 signed today. Here's the one on Count 2. In both of  
18 them, Box Number 2 is checked.

19 THE COURT: This is just the certification.

20 COURT COORDINATOR: What are you asking  
21 for?

22 THE COURT: It's a plea bargain case where  
23 matters were raised by written motion and ruled on before  
24 trial and not withdrawn or waived, and the Defendant has  
25 the right to appeal.

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1 MR. BRICK: And I haven't seen this form  
2 yet, Your Honor; but every plea I've ever done in this  
3 County has been: Plea bargain case, no right to appeal.

4 THE COURT: Both counts have this same  
5 block checked. That would be limited to pretrial motions  
6 it looks like.

7 MR. GREENING: There's no waiver of appeal.

8 (Off-record discussion between attorneys  
9 for the Defendant.)

10 MR. BRICK: All I can say is that's not  
11 what my understanding of our agreement was, that you were  
12 going to be appealing it.

13 MR. GREENING: Well, I remember John Hunter  
14 and I had a conversation with you about pleading no  
15 contest.

16 MR. BRICK: I remember you asked us for a  
17 no contest.

18 MR. GREENING: And we said we'd waive the  
19 right to appeal, and we set pretrial motions.

20 MR. BRICK: And we said we wouldn't do a no  
21 contest plea, but there was no discussion about right to  
22 appeal. I mean, every plea that I've ever done with you  
23 specifically --

24 MR. GREENING: No, I understand. That was  
25 part of our discussion though, was we were going to enter

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1 a no contest plea and waive our right to appeal. And then  
2 you said: No, I can't let you do a no contest plea.

3 MR. BRICK: Right.

4 MR. GREENING: So we said: Okay.

5 COURT COORDINATOR: What was the record?

6 What did they --

7 THE COURT: I need to see the warnings  
8 forms, State's Exhibit 1, in that case.

9 COURT COORDINATOR: It's right here, Judge.  
10 That's Count 1, Judge; and here's Count 2.

11 THE COURT: Which one is the prison case?

12 MR. BRICK: Count 1, I believe.

13 THE COURT: Nothing's struck out on this  
14 form.

15 MR. GREENING: Let me see that one. I  
16 thought we struck it out.

17 MR. VAN BRUNT: I didn't see the waiver in  
18 it.

19 MR. GREENING: One right here, but -- only  
20 with permission of the Court, yeah.

21 MR. VAN BRUNT: Yeah.

22 MR. GREENING: We may file with permission  
23 of the Court, Judge.

24 THE COURT: With permission of the Court;  
25 is that correct? Do you oppose that?

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1 MR. BRICK: That's my understanding of how  
2 a guilty plea goes, is with permission only of the Court.

3 THE COURT: Permission is denied.

4 Have a seat in the jury box.

5 COURT COORDINATOR: Judge, if you could  
6 sign this one, please.

7 Craig, this is your copy.

8 MR. GREENING: Thank you.

9 (Hearing adjourned.)

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1 STATE OF TEXAS

2 COUNTY OF BRAZOS

3 I, Denise C. Phillips, Official Court Reporter in and  
4 for the 272nd District Court of Brazos County, State of  
5 Texas, do hereby certify that the above and foregoing  
6 contains a true and correct transcription of all portions  
7 counsel for the parties to be included in this volume of  
8 the Reporter's Record in the above-styled and numbered  
9 cause, all of which occurred in open court or in chambers  
10 and were reported by me.

11 I further certify that this Reporter's Record of  
12 the proceedings truly and correctly reflects the exhibits,  
13 if any, offered by the respective parties.

14 I further certify that the total cost for the  
15 preparation of this Reporter's Record is \$90.00 and was  
16 paid/will be paid by Brazos County District Attorney's  
17 Office.

18 /s/ Denise C. Phillips  
19 Denise C. Phillips, CSR  
20 Texas CSR 6482  
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23 Brazos County, Texas  
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Expiration: 12/31/2017

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## **APPENDIX – TAB 3**

## R E P O R T E R ' S R E C O R D

Volume 1 of 1 Volumes

Trial Court Cause No. 13-04695-CRF-272

Court of Appeals No. 10-17-00016-CR

THE STATE OF TEXAS                   :     IN THE DISTRICT COURT OF  
  :  
VS.                                     :     BRAZOS COUNTY, T E X A S  
  :  
KELSEY JO LACKEY                   :     272nd JUDICIAL DISTRICT

---

MOTIONS HEARING

---

On the 30thday of January, 2017, the following  
proceedings came on to be held in the above-titled and  
numbered cause before the Honorable Travis B. Bryan, III,  
Judge Presiding, held in Bryan, Brazos County, Texas.

Proceedings reported by computerized stenotype  
machine.

Denise Phillips, Texas CSR #6482  
Official Court Reporter - 272nd District Court  
300 East 26th Street, Suite 204  
Bryan, Texas 77803  
979-361-4221

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## P R O C E E D I N G S

THE COURT: Okay. Everyone be seated.

State of Texas v. Kelsey Lackey.

MR. VAN BRUNT: Judge, Chad Van Brunt for Mr. Lackey. Good morning, Your Honor.

THE COURT: Good morning.

I just received a few minutes ago and have read State's Motion to Deny Bond and to Amend Trial Court Certification of the Defendant's Right of Appeal.

Have y'all had a chance to review that?

MR. VAN BRUNT: We have, Your Honor.

THE COURT: Prior to reading that earlier today, I prepared a -- this document, which I propose be entered. I'm running that by y'all now to see what your comments are.

MR. VAN BRUNT: Simply stated, Your Honor, we understand that the waiver and stipulation did in a sense seem to indicate and understand the Court's interpretation that there was a waiving of every type of motion, any pretrial matters.

Clearly, you can glean from the record though that it was not what we expressed to our client. The stipulation was misinterpreted as -- that the -- we came from the belief that pretrial matters were germane to the plea agreement. We had very clearly advised our

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1 client that since we were going to accept the guilty plea  
2 and not have the no contest plea that we were going to  
3 maintain our right to appeal the Motion to Quash that was  
4 filed in this case.

5 THE COURT: Uh-huh.

6 MR. VAN BRUNT: That was the intent  
7 definitely of our client for sure. We're disappointed of  
8 the confusion between the State. It seemed to -- although  
9 I was not present for the conversation, Your Honor, it  
10 seemed clear to me that when they returned from the  
11 initial plea in this case that it was Mr. Lackey and  
12 Craig's understanding that they discussed with the State  
13 this bargaining between the no contest plea.

14 What I'm concerned about is that we  
15 cannot -- if this is how the Trial Court is going to  
16 certify the right to appeal, then we have misadvised our  
17 client, is what we're concerned about. It seemed clear to  
18 the parties on our side of the fence what was going to be  
19 understood and why I was -- why I approached you  
20 immediately after with the notice, Your Honor.

21 THE COURT: In no way did I have in my mind  
22 there could be an appeal in this case. I assumed at the  
23 plea hearing that this was being conducted like every  
24 other plea where unless some kind of appeal is brought to  
25 my attention and it's waived by the signing of State's

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1 Exhibit 1, that that is the final decision in any appeal.

2 That was handed to me. I didn't read it.  
3 I signed it by mistake, and my intent is to undo it and  
4 replace it with that document in front of you because it  
5 is not the intent of the Court that that previous order be  
6 certified and sent up on appeal.

7 MR. VAN BRUNT: So just to make my  
8 understanding clear, Your Honor, you're stating that if  
9 the -- let's say we had a situation where that stipulation  
10 was crossed out, are you stating that you would not have  
11 accepted the plea agreement in that arrangement?

12 THE COURT: I'm not telling you any more  
13 reason for doing what I'm doing. I've just stated it into  
14 the record.

15 MR. VAN BRUNT: Thank you, Your Honor.

16 I would only point out to you a basic  
17 tenant of the plea bargaining, and I have some case law on  
18 point. So I brought Porris (phonetic) v. State. It's not  
19 a published opinion because most of these are not, but  
20 it's 2014 Tex App Lexis 3028, and it's a case out of the  
21 El Paso Court, 2014.

22 It states a basic tenant that the only --  
23 that pretrial matters that were raised -- written motions  
24 that were -- that were presented and denied do not require  
25 the consent of the Court. You can read Headnote 1 right

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1 at the very beginning. It says: However, an appellant  
2 does not require the permission of the Trial Court on  
3 those matters which have been raised by written motion  
4 prior to trial setting. Texas Code of Criminal Procedure  
5 44.02.

6 We would argue, Your Honor, just for the  
7 record, that we believe that the permission was not  
8 necessary, that we should have this right to certify and  
9 that the prior certification is correct, Your Honor.

10 THE COURT: Counsel, my belief is that you  
11 have pulled a fast one on the Court, and I'm going to  
12 correct that situation that you have done.

13 MR. VAN BRUNT: I take great objection to  
14 that, Your Honor.

15 THE COURT: I take great objection to what  
16 you've done.

17 MR. VAN BRUNT: Your Honor, I take great  
18 objection to the fact that we have clearly discussed for a  
19 long time on our side of the fence. I am upset that I was  
20 not here to have that conversation with Mr. Brick.

21 THE COURT: Mr. Brick did not affirm to me  
22 that you had any conversation of this nature --

23 MR. VAN BRUNT: I understand that.

24 THE COURT: -- to go to the length of what  
25 you're claiming.



1 MR. VAN BRUNT: Well, I understand, Your  
2 Honor; and I'm saying that our position is --

3 THE COURT: And it was not brought to my  
4 attention.

5 MR. VAN BRUNT: Your Honor, I -- I -- I do  
6 not feel I was trying to pull a fast one at all. As a  
7 matter of fact, that was part of the purpose that I  
8 specifically brought it to you. However, Your Honor, this  
9 is not germane to our decision.

10 THE COURT: You did try to pull a fast one,  
11 but you made one mistake. You've waived your right to  
12 appeal, and that includes your fast one.

13 MR. VAN BRUNT: Well, Your Honor, I take  
14 objection to that -- that attack; and I take it as a  
15 personal attack. I don't think that that is --

16 THE COURT: Well, it should be taken as a  
17 personal attack.

18 MR. VAN BRUNT: Well, Your Honor, if that  
19 is -- that is not germane to the record at this point. If  
20 the Court wishes to make its decision, I feel we have  
21 preserved our issue.

22 THE COURT: What do you say?

23 MR. BRICK: Judge, your proposed First  
24 Amended Trial Court Certification of Defendant's Right to  
25 Appeal, we would ask that you enter that into the record.

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1 THE COURT: You're okay with this?

2 MR. BRICK: Yes, Your Honor. We'd ask that  
3 you enter that into the Court's record.

4 THE COURT: You going to sign this or  
5 refuse to sign it, Counsel?

6 MR. VAN BRUNT: It's not our understanding  
7 of the parties. I believe we will object. We will not  
8 agree to that --

9 THE COURT: All right.

10 MR. VAN BRUNT: -- and will be filing --

11 THE COURT: I will place where it says:  
12 The Defendant and Defense Counsel refused to sign in open  
13 court.

14 MR. BRICK: And just for the record -- I  
15 wanted to be clear on the record so we have something at  
16 this hearing. It wasn't my understanding that this was  
17 going to be a preservation of any right to appeal. Any  
18 time I've ever done that in the past with any attorney  
19 locally or out of the County, that's been at least a part  
20 of the discussion. And I know that they came --

21 THE COURT: Absolutely. That's my -- I  
22 take judicial notice of the fact that that's been always  
23 the practice in Brazos County, both -- on both sides of  
24 the Bar.

25 MR. BRICK: And I know that Mr. Hunter and

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1 Mr. Greening came to us at one point and talking about a  
2 no contest plea, and we said: No. They said: We'd waive  
3 our right to appeal to do that. They never discussed  
4 the -- any preservation or waiver of right to appeal after  
5 that with me; and so I don't -- I don't know where the  
6 preservation of right to appeal came from.

7 I don't usually see the Trial Court  
8 Certification. Typically, in a plea, the Defense attorney  
9 will go over that with their client. I don't usually see  
10 that, and I didn't see it in this case until January 6th.

11 THE COURT: It was slipped in.

12 MR. GREENING: No, it wasn't, Judge. I did  
13 that. I signed it with my client.

14 THE COURT: I believe it was.

15 MR. GREENING: Judge, I -- I advised my  
16 client he had a right to appeal on the pretrial motions  
17 only.

18 THE COURT: I don't know. Well, you may  
19 have been advising him according to what you were fixing  
20 to slip in and do.

21 MR. GREENING: I did not slip it in, Judge.  
22 I handed all the documents --

23 THE COURT: Well, that's my impression,  
24 Mr. Greening.

25 MR. GREENING: Okay.

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## 1                                   RULING OF THE COURT

2                   THE COURT:   So here's the way I'm going to  
3 correct the record:   Trial Court's First Amended  
4 Certification of Defendant's Right to Appeal Being Entered  
5 Within 30 Days of the Sentencing.   I, Judge of the Trial  
6 Court, certify this criminal case is a plea bargain case;  
7 and matters were raised by written motion, filed and ruled  
8 on before trial; but those matters were waived at the plea  
9 hearing; and permission to appeal, though not appropriate,  
10 was denied.   See State's Exhibit Number 1.   Signed by me.  
11 And I have X'd out all the other options with regard to  
12 appeal -- or the Defendant's right to any appeal.

13                               So this document is here now entered of  
14 record in the case.

15                   MR. BRICK:   And we were asking for an  
16 amendment anyway under what we called it today, just under  
17 Texas Rules of Appellate Procedure.

18                   THE COURT:   I read that, but I want to be  
19 clear.   I had already decided to do it before you even  
20 asked for it.

21                   MR. BRICK:   But also the Court has  
22 jurisdiction to do that under 25.2, amend the  
23 certification of the record.

24                   THE COURT:   Thank you.   So amended.

25                               Do we have anything else to discuss today?

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1 MR. BRICK: I don't believe so.

2 MR. VAN BRUNT: Not other than it will be  
3 our intent to file a Motion for New Trial under 11.072 on  
4 involuntariness of Mr. Lackey's --

5 THE COURT: Go right ahead.

6 Anything else?

7 MR. BRICK: No, sir.

8 THE COURT: This case is adjourned.

9 What about the Writ of Habeas Corpus,  
10 Mr. Van Brunt?

11 MR. VAN BRUNT: Your Honor, that's the -- I  
12 believe that's if we were dealing with right now a request  
13 for bail hearing pending appeal, is what the Writ of  
14 Habeas Corpus had to do with, Your Honor.

15 RULING OF THE COURT

16 THE COURT: So that's moot now.

17 MR. VAN BRUNT: That would be my  
18 understanding of your position, Your Honor.

19 THE COURT: Okay.

20 MR. VAN BRUNT: Thank you.

21 May we be excused, Your Honor?

22 THE COURT: You may.

23 (Hearing adjourned.)

24

25

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1 STATE OF TEXAS

2 COUNTY OF BRAZOS

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4 for the 272nd District Court of Brazos County, State of  
5 Texas, do hereby certify that the above and foregoing  
6 contains a true and correct transcription of all portions  
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14 I further certify that the total cost for the  
15 preparation of this Reporter's Record is \$85.00 and was  
16 paid/will be paid by Glenn Lackey.

17 /s/ Denise C. Phillips  
18 Denise C. Phillips, CSR  
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